In The

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 644

BILLY DON FRANKLIN BOULDEN,

PETITIONER

vs.

STATE OF ALABAMA,

RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA
BRIEF AND ARGUMENT OF RESPONDENT

MacDONALD GALLION
Attorney General
State of Alabama

DAVID W. CLARK
Assistant Attorney General
State of Alabama

State Administrative Building
Montgomery, Alabama 36104

Counsel for Respondent

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BRIEF AND ARGUMENT ON THE MERITS
BRIEF AND ARGUMENT OF RESPONDENT

I

OPINIONS OF THE COURT BELOW

The opinion of the Supreme Court of Alabama is reported as follows:

Billy Don Franklin Boulden v. State, 179 So. 2d 20.

The Order of the District Court, dated August 26, 1966, in the case of *Billy Don Franklin Boulden vs. William C. Holman*, Warden, Kilby Prison, is set out in the record (A. pp. 106-112) affirmed by the United States Court of Appeals for the Fifth Circuit, 385 F. 2d 102, rehearing denied 393 F. 2d 932. Writ of certiorari was granted October 14, 1968 (A. 126).

II

JURISDICTION

The petitioner has applied for a writ of certiorari from the Supreme Court of the United States to review the judgment of the United States Court of Appeals for the Fifth Circuit, 385 F. 2d 102, rehearing denied 393 F. 2d 932. Petitioner applies under the provisions of Title 28, Section 1254(1), United States Code.

III

QUESTIONS PRESENTED

1. Whether the confessions made by petitioner, made on May 1, 2 and 6, 1964, were violative of the Fifth and Fourteenth Amendments to the Constitution of the United States.

2. Whether the reception into evidence of admissions against interest and purported confessions obtained after Boulden's arrest by the State at a time when petitioner was not represented by counsel deny him constitutional rights guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

3. Were Boulden's constitutional rights violated when prospective jurors were challenged by the State and excused pursuant to Title 30, Section 57, Code of Alabama 1940, as having a fixed opinion against capital punishment?

IV

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth, Sixth and Section 1 of the Fourteenth Amendments to the Constitution of the United States.

V

STATEMENT

Billy Don Franklin Boulden, petitioner, was convicted in the Circuit Court of Morgan County, Alabama, of the first degree murder of Loyd C. Hays and sentenced to death in accordance with the verdict of the jury. On appeal to the Supreme Court of Alabama the conviction was upheld. After denial of executive clemency, petition for a writ of habeas corpus was filed in the United States District Court, Middle District of Alabama. After a pretrial hearing, it was stipulated and agreed that the issue to be determined was whether the reception into evidence of admissions against interest and purported confessions obtained after Boulden's arrest and when Boulden was not represented by counsel denied him constitutional rights guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. Habeas corpus was denied (A. pp. 106-112).

Appeal was taken to the United States Court of Appeals for the Fifth Circuit and the Order of the District Court was affirmed (A. pp. 113-120), 385 F. 2d 102, rehearing denied 393 F. 2d 932. The writ of certiorari was granted on October 14, 1968 (A. 126).

VI

SUMMARY OF ARGUMENT

1. Under the "totality of circumstances" rule, the confessions made by petitioner on May 1, 2 and 6, 1964, were voluntary and not violative of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

2. It is a good cause of challenge by the State that the person has a fixed opinion against capital or penitentiary punishment and the rule advanced in *Witherspoon v. Illinois* does not apply to Title 30, Section 57, Code of Alabama 1940.

OPINION

SUPREME COURT OF THE UNITED STATES

No. 644.—October Term, 1968.

Billy Don Franklin Boulden, Petitioner, v. William C. Holman, Warden.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[April 2, 1969.]

Mr. Justice Stewart delivered the opinion of the Court.

The petitioner was convicted in the Circuit Court of Morgan County, Alabama, of first degree murder, and was sentenced to death in accordance with the verdict of the jury. After the Alabama Supreme Court affirmed the conviction, 278 Ala. 437, 179 So. 2d 20, the petitioner instituted this habeas corpus proceeding in the United States District Court for the Middle District of Alabama. District Judge Frank M. Johnson, Jr., denied relief, 257 F. Supp. 1013, and the Court of Appeals for the Fifth Circuit affirmed. 385 F. 2d 102, rehearing denied, 393 F. 2d 932, 395 F. 2d 169. We granted certiorari. 393 U. S. 822.

I.

Although there was substantial additional evidence of the petitioner's guilt, his conviction was based in part on a confession he had made some days after his arrest. His request for habeas corpus relief rested on a claim that the introduction of that confession into evidence violated his rights under the Constitution.[1] Since his

[1] Two confessions were in fact obtained, although only the second was actually introduced into evidence. Both the District Court and the Court of Appeals properly noted that the second confession might have been the "end product of the earlier" one, in that "the accused [may have been] acutely aware that he had earlier made admissions against his interest and was, therefore, merely repeating

VII

ARGUMENT

Petitioner argues that the opinion of the United States Court of Appeals for the Fifth Circuit is in conflict with applicable decisions of this Honorable Court. A reading of the cases cited compared with this case emphasizes that the Fifth Circuit Opinion follows the thinking and rulings of this Court.

The case now before this Court was tried prior to *Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, and *Escobedo v. Illinois*, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, and the rulings thereon are inapplicable here. The totality of circumstances surrounding and leading to the confession must be considered in determining the crucial issue of voluntariness.

In *Spano v. New York*, 360 U. S. 315, 79 S. Ct. 1202, 3 L. Ed. 2d 1265, as to whether a confession was properly admitted into evidence, this Court stated:

> "As in all such cases, we are forced to resolve a conflict between two fundamental interests of society; its interest in prompt and efficient law enforcement, and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement. Because of the delicate nature of the constitutional determination which we must make, we cannot escape the responsibility of making our own examination of the record."

That case was reversed because of the involuntary nature of the confession extracted from a 25 year old foreign born man with a history of emotional instability, a first offender who was questioned by a battery of skilled interrogators over a long period of time and then being tricked into a confession by a childhood friend on the police force.

Certain criteria used in determining voluntariness in cases governed by pre-*Escobedo-Miranda* standards and totality of circumstances were set out in the opinion of the Fifth Circuit.

> "In Brown v. United States, 356 F. 2d 230 (10 Cir. 1966), the criteria found to be relevant were the following: age, mentality, and prior criminal experience of the accused; the length, intensity and frequency of interrogation; the existence of physical deprivation or mistreatment; and the threat of mistreatment or inducement." (A. 118)

A confession was held to be coerced and its use, over accused's objection, before a jury in a state trial for murder denied him due process where evidence showed that a mentally dull 19 year old Negro was arrested without a warrant, denied a hearing before a magistrate where he could be advised of his rights, was not advised of his right to remain silent or his right to counsel, was held incommunicado for three days, was denied counsel and members of his family turned away, was denied permission to make a telephone call, and was denied food for long periods and threatened with mob violence. *Payne v. Arkansas,* 356 U. S. 560, 78 S. Ct. 844, 2 L. Ed. 2d 975.

Each of the cases cited by petitioner contain several of the criteria used to determine that the confession in *Payne v. Arkansas,* supra, was involuntary and its use violative of due process. A reading of *Beecher v. Alabama,* 19 L. Ed. 2d 35, shows Beecher was shot in his right leg, threatened with death, shot at again, signed confessions under influence of morphine, etc.

A reading of the transcript of the trial (R. pp. 17-38) and the habeas corpus hearing (R. pp. 488-728) cannot fail to convince this Honorable Court, as it did the District Court and the Court of Appeals for the Fifth Circuit, that the confessions were voluntary. Both these Courts considered

the confessions in the light of *Culombe v. Connecticut*, 367 U. S. 588, 81 S. Ct. 1860, 6 L. Ed. 2d 1037.

Incidentally, the second confession in the *United States v. Bayer*, 331 U. S. 532, 67 S. Ct. 1394, 91 L. Ed. 1654, was held to be voluntary and admissible.

It is noted that at the hearing held on the morning of May 2, 1964, petitioner was fully advised of his rights by Judge Bloodworth (A. pp. 6, 7). It is further noted that he had been advised of his rights by Captain Williams on May 1, 1964 (A. 45). At the habeas corpus hearing in the District Court the following question was asked and answered:

"Q. Captain Williams, I believe you stated earlier that you advised the defendant he didn't have to make a statement and that he was entitled to a lawyer; is that correct?

"A. I did.

"Q. On May 1?

"A. Yes, sir." (A. 45)

There is a further conflict in the evidence. The first time that any knowledge of headaches in the Athens Jail on May 1, 1964, was had at the hearing on August 23, 1966 (A. 38). But compare with his true condition by his recorded voice on May 1, 1964, as follows:

"Q. How are you doing Billy—set down right here. How do you feel Billy?

"A. Pretty good.

"Q. Huh.

"A. Pretty good." (A. 57)

Respondent submits that, applying the "totality of circumstances" rule, the voluntariness of statements, admissions and confessions was shown. There was no prolonged questioning of petitioner, no deprivation of food, water, cigarettes, sleep or toilet facilities to break down his physical strength and erode his will to resist. There was no showing of injury to petitioner during his interrogation. He had no headache on May 1, 1964, at 10:30 P.M. (A. 57) and first revealed this ailment on August 23, 1966 (A. 38). He was shown to be of average intelligence in his school. He had suffered a broken leg as a child which kept him from playing football and occasionally had a headache but was otherwise in good physical condition.

The contention that the parents were not permitted to visit their son at the Decatur Jail is without merit as Billy Don Franklin Boulden was incarcerated in the Athens Jail as a precautionary measure at the time. This distinguishes it from *Darwin v. Connecticut*, 20 L. Ed. 2d 630, 88 S. Ct. 1488.

The opinion of the District Court reflects that the confession made on May 1, 1964, was voluntary; that petitioner was not deprived of food, water, cigarettes, was not mistreated in any way; that he was removed to Athens as a precautionary measure and permitted to see his parents on May 2, 1964; that there was no credible evidence of any coercion, threats, or attempts to procure from Boulden an admission against his will nor any promise of leniency (A. 107, 108). The Court further found that the confession made on May 6, 1964, was voluntarily made after petitioner had been fully advised of his rights by Judge Bloodworth on May 2, 1964 (A. 111).

This ruling was made after a hearing on the merits lasting approximately one and a half days during which he saw and heard the witnesses and could evaluate their testimony as well as having the transcript of the trial.

The United States Court of Appeals applied the "totality of circumstances" rule and affirmed the District Court, holding both confessions were voluntary (A. 118). That Court reviewed the evidence and also concluded that Boulden's age and mental condition were not so unusual as to render the confession involuntary.

Petitioner argues that the trial court asked each group of prospective jurors if they had a fixed opinion against capital or penitentiary punishment, and upon their affirmative reply, were excused constituted reversible error in the light of *Witherspoon v. Illinois*, 88 S. Ct. ____, 20 L. Ed. 2d 776.

Title 30. Section 57, Code of Alabama 1940, provides:

> "Additional ground of challenge in certain cases in favor of State.—On the trial for any offense which may be punished capitally, or by imprisonment in the penitentiary, it is a good cause of challenge by the State that the person has a fixed opinion against capital or penitentiary punishments, or thinks that a conviction should not be had on circumstantial evidence; which cause of challenge may be proved by the oath of the person, or by other evidence."

The case of *Witherspoon v. Illinois*, 88 S. Ct. ____, 20 L. Ed. 2d 776, held, in substance, that the Illinois statute which permitted the State to challenge a venireman on the grounds that he had conscientious scruples against capital punishment or that he is opposed to the same was illegal and deprived the defendant of his constitutional rights. That case indicated it dealt only with the statute before it. This Honorable Court held:

> "The issue before us is a narrow one. It does not involve the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt."

> Nor does it involve the State's assertion of a right to exclude from a jury in a capital case those who say that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them. For the State of Illinois did not stop there, but authorized the prosecution to exclude as well all who said they were opposed to capital punishment and all who indicated that they had conscientious scruples against inflicting it. . . . "

Webster's Dictionary defines "fixed" as "1. firm; not movable; 2. established; set. 3. steady; resolute; 4. obsessive; as, a fixed idea."

Certainly, there is much difference in having a *fixed opinion* against capital punishment and having conscientious scruples against capital punishment or being opposed to same. The Alabama term "fixed opinion against" obviously means just what the term implies, that under no circumstances would a juror impose capital punishment.

The *Witherspoon* case and the doctrine advanced therein is not applicable to the Alabama statute and the qualifications of the jury in the case now before this Honorable Court.

Abolition of the death penalty would clearly appear to be a state legislative function. Also, it is respectfully pointed out that Alabama provides the power to the Governor to commute a death sentence.

VIII

CONCLUSION

For the foregoing reasons, respondent submits that petitioner was indicted, tried, convicted and sentenced properly and that the constitutional rights of said petitioner were not violated. Therefore, the case should be affirmed.

Respectfully submitted,

MacDonald Gallion
MACDONALD GALLION
Attorney General of Alabama

David W. Clark
DAVID W. CLARK
Assistant Attorney General
of Alabama

State Administrative Building
Montgomery, Alabama 36104

Counsel for Respondent

IX

CERTIFICATE

I, David W. Clark, one of the attorneys for respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7 day of January, 1969, I served a copy of the foregoing brief and argument of respondent on writ of certiorari upon one of the attorneys for petitioner, by mailing a copy in a duly addressed envelope to said attorney of record, as follows:

To: Honorable William B. Moore, Jr.
1201 Bell Building
P. O. Box 270
Montgomery, Alabama 36101

David W. Clark

DAVID W. CLARK
Assistant Attorney General
of Alabama

State Administrative Building
Montgomery, Alabama 36104

trial antedated our decisions in *Escobedo* v. *Illinois*, 378 U. S. 478, and *Miranda* v. *Arizona*, 384 U. S. 436, that claim is essentially a contention that under the constitutional standards prevailing prior to those decisions, his confession was made involuntarily. See *Johnson* v. *New Jersey*, 384 U. S. 719; *Davis* v. *North Carolina*, 384 U. S. 737.

After holding a full hearing regarding the issue and considering the state court record, the District Court, in an opinion applying the proper constitutional standards, was unable to conclude that the petitioner's confession was "other than voluntarily made." The confession, the court found, was "simply not coerced." 257 F. Supp., at 1017, 1016. The Court of Appeals, likewise applying appropriate standards, similarly could

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"his ostensibly unerasable [*sic*] words of confession." 385 F. 2d, at 106. See *Darwin* v. *Connecticut*, 391 U. S. 346; *Beecher* v. *Alabama*, 389 U. S. 35; cf. *United States* v. *Bayer*, 331 U. S. 532, 540. Consequently, in order to determine whether the second confession was properly admitted, they passed upon the voluntariness of the first as well as the second confession. We have considered the record in like fashion.

There is evidence that, even before his two formal confessions were obtained, the petitioner had, shortly after his arrest, admitted killing the deceased. The evidence was controverted, both as to whether the petitioner made any such admission and as to whether, if he did, the admission was voluntary. It is suggested in dissent that, because the opinions of the District Court and the Court of Appeals do not explicitly refer to that evidence, it must be assumed that those courts did not consider it, and that the conclusions they reached should therefore not be sustained. We cannot agree. The petitioner has consistently contended that the events immediately following his arrest contributed to the involuntariness of his later confessions, and we are unable to assume that the evidence referred to was not considered by the District Court and the Court of Appeals. In any event, our own decision with respect to the voluntariness issue has been reached with that evidence fully in mind.

"find from the record here no plausible suggestion that Boulden's will was overborne . . ." 385 F. 2d, at 107.[2]

Little purpose would be served by an extensive summation of the record in the District Court proceedings and in the state trial court. The question whether a confession was voluntarily made necessarily turns on the "totality of the circumstances"[3] in any particular case, and most of the relevant circumstances surrounding the petitioner's confession are set out in the opinions of the District Court and the Court of Appeals. Suffice it to say that we have made an independent study of the entire record[4] and have determined that, although the issue is a relatively close one, the conclusion reached by the District Court and the Court of Appeals was justified.

II.

In seeking habeas corpus the petitioner challenged only the admission of his confession into evidence, and his petition for certiorari was limited to that claim. In his brief and in oral argument on the merits, however, he has raised a substantial additional question: whether the jury that sentenced him to death was selected in accordance with the principles underlying our decision last Term in *Witherspoon* v. *Illinois*, 391 U. S. 510.

We held in *Witherspoon* that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U. S., at 522. In

[2] In affirming the petitioner's conviction, the Alabama Supreme Court had reached a like conclusion. 278 Ala., at 446–452, 179 So. 2d, at 28–34.

[3] *Fikes* v. *Alabama*, 352 U. S. 191, 197.

[4] See *Spano* v. *New York*, 360 U. S. 315, 316.

the present case, the record indicates that no less than 15 prospective jurors were excluded by the prosecution under an Alabama statute that provides:

> "On the trial for any offense which may be punished capitally, . . . it is a good cause of challenge by the state that the person has a fixed opinion against capital . . . punishmen[t] . . . ."[5]

That statutory standard has been construed by the Alabama Supreme Court to authorize the exclusion of potential jurors who, although "opposed to capital punishment, . . . would hang some men." *Untreiner* v. *State*, 146 Ala. 26, 33, 41 So. 285, 287.

However, as we emphasized in *Witherspoon*, "The critical question . . . is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood—or misunderstood—by prospective jurors." 391 U. S., at 516, n. 9. "The most that can be demanded of a venireman in this regard," we said, "is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out . . . ." *Id.*, at 522, n. 21. We made it clear that "[u]nless a veniremen states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position." *Id.*, at 516, n. 9.

It appears that at the petitioner's trial two prospective jurors were excluded only after they had acknowledged

[5] Ala. Code, Tit. 30, § 57.

that they would "never" be willing to impose the death penalty.* Eleven veniremen, however, appear to have been excused for cause simply on the basis of their affirmative answers to the question whether, in the statutory language, they had "a fixed opinion against" capital punishment. The following excerpt from the record is typical of those instances:

"THE COURT: Do you have a fixed opinion against capital punishment?

"MR. SEIBERT: Yes, sir.

"MR. HUNDLEY: We challenge.

"THE COURT: Defendant?

"MR. CHENAULT: No questions.

"THE COURT: Stand aside. You are excused."

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*"THE COURT: . . . Do you have a fixed opinion against capital or penitentiary punishment?

"JOHN L. NELSON raised his hand.

"MR. HUNDLEY: Challenge.

"THE COURT: Do you have a fixed opinion against capital or penitentiary punishment?

"MR. NELSON: Capital punishment.

"THE COURT: You think you would never be willing to inflict the death penalty in any type case?

"MR. NELSON: Yes, sir.

"MR. HUNDLEY: We challenge.

"THE COURT: Defendant?

"MR. CHENAULT: No questions.

"THE COURT: Stand aside, Mr. Nelson.

"E. O. MOON raised his hand.

"THE COURT: Do you have a fixed opinion against capital or penitentiary punishment?

"MR. MOON: Capital punishment.

"THE COURT: You mean you would never inflict the death penalty on [*sic*] any case?

"MR. MOON: That's right.

"MR. HUNDLEY: Challenge.

"THE COURT: Defendant?

"MR. CHENAULT: No questions.

"THE COURT: Stand aside, Mr. Moon."

Two other veniremen seem to have been excluded merely by virtue of their statements that they did not "believe in" capital punishment.[1] Yet it is entirely possible that a person who has "a fixed opinion against" or who does not "believe in" capital punishment might nevertheless be perfectly able as a juror to abide by existing law—to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case.

It appears, therefore, that the sentence of death imposed upon the petitioner cannot constitutionally stand under *Witherspoon* v. *Illinois*. We do not, however,

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[1] "THE COURT: What is your position on capital punishment or penitentiary punishment?

"MR. COLLIER: I don't believe in capital punishment.

"THE COURT: State?

"MR. HUNDLEY: Challenge.

"THE COURT: Any questions, Mr. Chenault?

"MR. CHENAULT: No questions.

"THE COURT: You are excused. . . .

. . . . . .

"MR. PATTON: . . . and I don't believe in capital punishme

"MR. HUNDLEY: I'll challenge Mr. Patton on that answer, on the ground he doesn't believe in capital punishment.

"THE COURT: Any questions by the defendant?

"MR. CHENAULT: No questions.

"THE COURT: We . . . will let you stand aside."

As the initial portion of this colloquy and that set out in footnote 6 indicate, Alabama law also authorizes the exclusion of any potential juror who has a "fixed opinion against . . . penitentiary" punishment. Ala. Code, Tit. 30, § 57. Two veniremen were excused when they merely responded affirmatively to the disjunctively phrased question whether they had "a fixed opinion against capital or penitentiary punishment." It is thus not possible to discern from the record which type of punishment they objected to, although the more likely assumption would be that it was capital punishment. We did not in *Witherspoon* pass upon the validity of the "penitentiary" analogue to death-qualification of jurors, and we intimate today no opinion regarding that question.

finally decide that question here, for several reasons. First, the *Witherspoon* issue was not raised in the District Court, in the Court of Appeals,[8] nor in the petition for certiorari filed in this Court. A further hearing directed to the issue might conceivably modify in some fashion the conclusion so strongly suggested by the record now before us. Further, it is not clear whether the petitioner has exhausted his state remedies with respect to this issue. Finally, in the event it turns out, as now appears, that relief from this death sentence must be ordered, a local federal court will be far better equipped than are we to frame an appropriate decree with due regard to available Alabama procedures.

Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded to the District Court, where the issue that has belatedly been brought to our attention may be properly and fully considered.

It is so ordered.

MR. JUSTICE BLACK, while still adhering to his dissent in *Witherspoon* v. *Illinois*, 391 U. S. 510, 532, acquiesces in the Court's judgment and opinion.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

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[8] The Court of Appeals' decision was rendered prior to our decision in *Witherspoon*.

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MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

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SUPREME COURT OF THE UNITED STATES

No. 644.—October Term, 1968.

Billy Don Franklin Boulden, Petitioner, v. William C. Holman, Warden.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[April 2, 1969.]

Mr. Justice Harlan, whom The Chief Justice and Mr. Justice Marshall join, concurring in part and dissenting in part.

I agree that the case must be remanded to the District Court for a determination of the *Witherspoon* question, and I therefore join in Part II of the Court's opinion. However, I believe that on remand the District Court should also consider an aspect of petitioner's coerced confession claim which the opinions in the two courts below completely ignore, and to which this Court pays only passing attention.

The Court states that "two confessions were in fact obtained, although only the second was actually introduced into evidence." *Ante*, n. 1 The first of these was obtained during several hours of interrogation in the Limestone County jail on the night of petitioner's arrest, May 1, 1964. The second was obtained during petitioner's re-enactment of the crime on May 6. The courts below examined the circumstances in which both confessions were obtained, and concluded that both were voluntary. In my opinion this does not exhaust the coerced confession issue.

As the Court is compelled to recognize, petitioner made inculpatory statements on not two, but *three* different occasions. The first of these was on the *afternoon* of May 1, preceding the interrogation at the jail.[1]

[1] This appears not only from petitioner's and respondent's oral evidence at the habeas corpus hearing, but from the transcript of

On that afternoon, petitioner was apprehended by law enforcement officers near the scene of the crime. According to petitioner, an officer of the Highway Patrol approached him and asked his name:

> "I told him; then he told me to run because he had been wanting to kill him a nigger a long time . . . . [H]e told me to run, and then he throwed the rifle up like he was getting ready to shoot there." Record Transcript, pp. 539–540.

Petitioner was taken to the scene of the crime, where he was placed, in handcuffs, in a police car alone with Highway Patrol Captain Williams. He was not given any of the *Miranda* warnings.[2] As petitioner related:

> ". . . Captain Williams asked me what had happened, and I started to tell him; he cussed me and told me it wasn't . . . . I told Captain Williams I didn't

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the interrogation of the night of May 1, in which Captain Williams stated:

"Billy, now you understand what we are doing, we just want to talk to you, want you to tell us the truth about everything that happened today. *Now you know you talked with me today in the car and I just want you to repeat it all for Lt. Watts here . . . .*" Appendix, p. 57. (Emphasis added.)

[2] "The review of voluntariness in cases in which the trial was held prior to our decisions in *Escobedo* and *Miranda* is not limited in any manner by these decisions. On the contrary, that a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation, as is now required by *Miranda*, is a significant factor in considering the voluntariness of statements later made. . . . . Thus, the fact that Davis was never effectively advised of his rights gives added weight to the other circumstances described below which made his confessions involuntary." *Davis* v. *North Carolina*, 384 U. S. 737, 740–741 (1966).

It may additionally be noted that petitioner in the present case was a slight, sickly youth, with an I. Q. of 83.

do it, and he told me that I did . . . and he told me I was lying again. And he got mad and start cussing. . . . Well, he called me a little bastard and a few more names . . . . Then he told me if I didn't confess, that the officers that was wanting to kill me, he wasn't going to stop them. . . . I told him that if he would get me out of there and wouldn't let them bother me, I would confess."

Later, two other officers got into the back of the car. One of them "asked me how old I was, and I told him, and he told me I was old enough to die." Record Transcript, p. 544.

There were about 15 or 20 officers at the scene, some of whom were armed with rifles and shotguns. Captain Williams testified that a "pretty good size crowd" was gathering—"I would say, in my best judgment, twenty-five or thirty cars . . . and people milling around out in the road." Record Transcript, pp. 647–648. It was under these circumstances that petitioner first admitted to Captain Williams that he had committed the crime.

Apparently because of the hostile crowd, petitioner was finally carried away from the area in a convoy of three cars; he was taken to a jail in another county as a precautionary measure. Thereafter he made what the courts have treated as the "first" confession.

The District Court was not, of course, obliged to credit petitioner's testimony concerning the officers' threats—some of which, but by no means all, was controverted by respondent's witnesses. But the court did not even address itself to the testimony. Indeed, except for the oblique statement that "there was no evidence . . . that the protection afforded Boulden on this occasion was inadequate," 257 F. Supp. 1013, 1014 (1966); 385 F. 2d 102, 104 (1967), neither of the courts below alluded to, let alone examined, the circumstances or the factual and

legal consequences of the events occurring on the afternoon of May 1, 1964.[1]

Without speculating as to the possible explanations for this disturbing lacuna in the opinions below, I would broaden the remand of this case so as to allow the District Court to consider whether petitioner was subjected to improper coercion on the afternoon of May 1, and what effect the events of that afternoon had on the voluntariness of the confession introduced into evidence at petitioner's trial. See *Darwin* v. *Connecticut*, 391 U. S. 346 (1968); *id.*, at 350 (separate opinion).

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[1] In dissenting from the denial of rehearing *en banc*, Judge Tuttle, joined by Chief Judge Brown, focussed on this issue:

"It is clear that there was an illegal interrogation and inculpatory statement obtained from this prisoner immediately following the shooting and it is clear beyond doubt that in the eliciting of the confession subsequently admitted by the State court as a valid confession much stress was placed by the officers on the fact that Boulden had already confessed under the circumstances which I find completely impermissible. . . . Here, it is clear beyond doubt that what has been held to be a legal confession was obtained by officers repeatedly calling the accused's attention to the fact that he had already made sufficiently damaging statements and they merely wanted him to fill in the details." 395 F. 2d 169 (1968).